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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 10.

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY,
Petitioner.

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR PETITIONER.

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The Daily Record Co. Print, Baltimore.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion and decision of the Court of Appeals of the State of Maryland has not yet been officially reported but it is printed in the record (R. 19-23) and is unofficially reported in 2 Atl. (2d) 689. The opinion of the Baltimore City Court (the *nisi prius* court) is not reported but is printed in the record (R. 9-17).

JURISDICTION.

The order of the Court of Appeals of the State of Maryland (the highest court of the State), which affirmed the order of the Baltimore City Court, was entered on December 1, 1938. On petition, the mandate was stayed pending an application to this Court for a writ of certiorari. The petition for a writ of certiorari was filed on February 25, 1939, and was granted on April 17, 1939. The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U. S. C., Section 344.

The jurisdiction of this Court is invoked on the ground that the Court below held the Maryland statute imposing a recordation tax invalid to the extent that it taxed the recordation of mortgages of the Home Owners' Loan Corporation, and in so doing held that the Home Owners' Loan Corporation is, under the Constitution and laws of the United States, immune from taxation on the recordation of its mortgages; that it is an instrumentality of the Federal government and, as such, is subject only to such State taxation as the statute authorizing its creation permits; and that the imposition of the tax in this case has been prohibited by the Act of Congress authorizing the creation of the Home Owners' Loan Corporation. The decision of the Court below was based solely upon the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, where it was held that a mortgage to the Federal Land Bank was not subject to a recordation tax imposed by an Alabama statute.

The petitioner is an elected officer of the State of Maryland, but this Court has the right, on his applica-

tion, to review, on certiorari, a decision of the Court of Appeals of Maryland declaring a Maryland statute repugnant to the Constitution and laws of the United States.[1]

STATEMENT OF THE CASE AND QUESTION PRESENTED.

By a final order and judgment, the Court of Appeals of Maryland affirmed a final order of the Baltimore City Court directing that a writ of mandamus be issued by the Clerk of the Baltimore City Court commanding the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a certain mortgage from Martin J. Burns and Mary Burns, his wife, to the Home Owners' Loan Corporation, dated March 11, 1938, upon the payment of the ordinary statutory recordation charge and "without the requirement of the affixation of the State of Maryland Documentary Stamps nor the State recordation tax of fifty cents" (R. 17).

The question presented is whether, under the Constitution of the United States and the Home Owners' Loan Act of 1933, the Maryland statute which imposes a uniform, non-discriminatory recordation tax on, and requires State of Maryland Documentary Stamps to be affixed to all mortgages, other than purchase money mortgages, offered for record and recorded in the State of Maryland, is invalid to the extent that it requires the payment of such tax and the affixation of such documentary stamps upon the recordation of mortgages on Maryland real estate from residents of Maryland to the Home Owners' Loan Corporation.

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[1] Coleman v. Miller, 307 U. S. , 83 L. Ed. 947 (Adv. Sheets).

SPECIFICATION OF ERRORS.

The Court of Appeals of Maryland erred:

1. In holding that the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, was necessarily controlling.

2. In failing to hold that the burden of the tax on the Home Owners' Loan Corporation as an instrumentality of the United States was speculative, remote and uncertain, if, indeed, it existed at all, in view of the fact that the tax could be, and customarily is, paid by the mortgagor.

3. In holding that the recordation of a mortgage on Maryland real estate from a citizen of the State of Maryland to the Home Owners' Loan Corporation was immune from taxation by the State of Maryland.

4. In failing to hold that the recordation of such a mortgage was not immune from the tax in view of the fact that the tax was uniform, operated upon all persons and corporations offering mortgages for record, and did not discriminate against the Home Owners' Loan Corporation or the United States.

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland (as enacted by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937) and the Home Owners' Loan Act of 1933, approved June 13, 1933, Chapter 64; 48 Stat. 128; 12 U. S. C., Sections 1461-1463a.

The Maryland statute is set out in full in the appendix, *infra*, pp. 53-54. The statute imposes a tax "upon

every instrument of writing recorded or offered for record * * * including mechanics' liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property". Assignments of mortgages, purchase money mortgages, absolute or partial releases, and orders of satisfaction are exempt from the tax. The tax is fifty cents, plus ten cents for each one hundred dollars, or fractional part thereof, of the consideration in the case of instruments conveying title, or of the principal amount of the debt in the case of instruments securing a debt, or reserving title as security for a debt.[2]

It is conceded that this statute imposes a tax and not merely a service charge for recording. Likewise, it must be conceded by the respondent that the tax is uniform, that it operates upon all persons and corporations offering mortgages and other instruments of writing for record, and that it does not discriminate against the Home Owners' Loan Corporation or the United States. No question as to the construction or meaning of the statute is involved in this case, it being admitted that by its terms the statute purports to tax the recordation of a mortgage of the Home Owners' Loan Corporation. However, the statute does not impose a tax upon the Home Owners' Loan Corporation or in any way desig-

[2] The tax imposed by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937 by its terms would expire on September 30, 1939, but the tax, with certain modifications not here important, has been continued by Section 6 of Chapter 277 of the Acts of the General Assembly of Maryland of 1939.

nate the person by whom the tax is to be paid. In the case of deeds and other instruments conveying title, the tax is customarily divided between the parties; in the case of mortgages, the tax is customarily paid by the mortgagor. Although this question has never been presented to or decided by the Court of Appeals of Maryland, it is obvious from a reading of the statute and is confirmed by the fact that the Attorney General of Maryland, who is by law the legal adviser of the Clerks of the Courts who collect the tax, has formally advised such Clerks that parties, as between themselves, may make any arrangement they choose for the payment of the tax. A copy of the formal opinion of the Attorney General of Maryland is set out in the appendix, *infra*, p. 67.

The Home Owners' Loan Act of 1933 is set out in full in the appendix, *infra*, pp. 55-56.

The respondent, Home Owners' Loan Corporation, was organized by resolution of the Federal Home Loan Bank Board, pursuant to Section 1463a of the Home Owners' Loan Act of 1933, which provides as follows:

> "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation."

We are here particularly concerned only with that part of Section 1463(c) of the Act which reads as follows:

> "The bonds issued by the corporation under this sub-section shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

STATEMENT.

The petitioner is the Clerk of the Superior Court of Baltimore City (a court of record of the State of Maryland) and as such, under the laws of Maryland, has charge of the recording of all deeds, mortgages and other like instruments conveying real estate located in Baltimore City (R. 2). A duly executed mortgage to the Home Owners' Loan Corporation on real estate in Baltimore City was presented to the petitioner with the request that the same be recorded among the Land Records of Baltimore City. The correct amount of the statutory recordation charge was tendered but since there were no State of Maryland Documentary Stamps affixed to the mortgage and since the Home Owners' Loan Corporation refused to pay the recordation tax of fifty cents the petitioner refused to accept the mortgage for record (R. 2-3).

Under the Maryland law the recording of the mortgage was necessary for the adequate protection of the

mortgagee (R. 2) and upon the refusal of the petitioner to record the mortgage without the stamps being affixed thereto and without the payment of the special recordation tax of fifty cents, the Home Owners' Loan Corporation filed a petition for a writ of mandamus in the Baltimore City Court (R. 1-8). The petition was demurred to (R. 8), and, the demurrer being overruled (R. 9), the petitioner herein declined to answer. The Baltimore City Court then passed an order directing the Clerk thereof to issue the writ of mandamus (R. 17-18). It is conceded that the facts stated in the petition (but not the conclusions of law) are true.

The petition alleges that the Home Owners' Loan Corporation is a corporate instrumentality of the United States organized, existing and operating pursuant to the Home Owners' Loan Act of 1933 (12 U. S. C. Secs. 1461 to 1463a, inclusive) whose entire capital stock is owned by the United States (R. 1). The Home Owners' Loan Corporation has been operating in Maryland as well as in other States and in the course of its operations made a loan of $111.00, payable one day after date, with interest at 5% per annum, to Martin J. Burns and Mary Burns upon the security of a mortgage on certain leasehold property in Baltimore City (R. 1-2). The mortgage was promptly tendered to the petitioner herein, as the Clerk of the Superior Court of Baltimore City, for record but he refused to record the same unless the tax prescribed by Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland was paid in addition to the usual recordation charge which was tendered to him (R. 2-3). The petition further alleges that the stamp and recording tax imposed by said Sections 213 and 214 of the Maryland Code is an excise tax and

not a service charge; that the Home Owners' Loan Corporation, by reason of the Home Owners' Loan Act of 1933 and the fact that it is an instrumentality of the United States, is immune and exempt from State taxation on its mortgages; and that the attempted collection of the tax on the recordation of its mortgages is an unlawful interference with its operations, placing a burden, impediment and obstruction upon its functions, and operating to hinder, delay and embarrass it in the exercise of the duties imposed upon it by law (R. 3-4).

As illustrative of the scope of the corporation's operations, the petition alleges that about $46,000,000 have been loaned on mortgages in Maryland since operations were begun and that the corporation has acquired title to about 2,000 separate pieces of property in Maryland (R. 4).

SUMMARY OF ARGUMENT.

At its regular session in 1937 the Legislature of Maryland passed an Act[3] imposing certain taxes to raise money for state relief purposes. The Governor of the State vetoed the bill and immediately called a special session of the Legislature to consider the urgent problem of relief in Maryland and to provide some means of raising sufficient revenue to enable the State to match Federal appropriations under the Social Security Act and to furnish such additional direct relief as was absolutely essential to furnish aid to the needy. At the special session held in April and May, 1937, the Legislature considered relief problems almost exclusively. Maryland is a small State; its tax resources are not unlimited and the problem of raising sufficient revenue for mini-

[3] Chapter 382 of the Acts of 1937.

mum relief purposes was and is a serious one. Because of local conditions many forms of taxation availed of by other States are not practicable in Maryland. It was thought not possible to raise sufficient revenue by an increase in property taxes which were already heavy. Resort had to be made to special excise or privilege taxes.

As finally enacted, Chapter 11 of the Acts of the Special Session of 1937, imposed five new excise and license taxes, including an income tax, increased one existing excise tax and continued three existing excise and license taxes. By the terms of the Act the entire revenue from these excise taxes and license fees is required to be deposited in a "State Fund for Aid to the Needy" and is disbursed therefrom only for relief purposes and for the purpose of matching Federal appropriations under the Social Security Act.

The recordation tax on deeds, mortgages and other instruments offered for record was one of the new excise taxes imposed by Chapter 11 of the Acts of the Special Session of 1937.[1] In imposing the tax the statute is not discriminatory; it applies to all alike; and it does not contain any exemptions or exceptions. If, as held by the Court below, an exemption must be written into the Act by the overriding force of the Federal Constitution in favor of the Home Owners' Loan Corporation then a

[1] It was estimated that the total revenue from all nine excise taxes and license fees for a two year period would be $7,000,000. Of this total $470,000 was expected to be realized from the recordation tax. Prior to the regular session of the Legislature in 1939 a Commission of experts appointed by the Governor exhaustively studied the problem of raising sufficient revenue. They recommended the continuance of most of the excises imposed by the 1937 Act, including the recordation tax. Of the total of $16,560,000 which they estimated would be realized from these special excises in a two year period, $470,000 was estimated as the probable revenue from the recordation tax.

similar exemption must exist as to each of the other numerous lending agencies of the Federal Government. If the claimed immunity is confirmed in this case, then we may expect a similar claim to immunity to be made by the Reconstruction Finance Corporation, the Federal Land Banks, the National Banks, the State Banks which are members of the Federal Reserve System, the Farm and Crop lending agencies, the Federal Housing Administration, the Federal Savings and Loan Corporations and the many other Federal lending agencies too numerous to mention.[5] If so, this legitimate and much needed source of State taxation would be substantially impaired, because it is common knowledge that a very large percentage of mortgage loans made in recent years have emanated from these lending agencies. Moreover, if these Federal agencies are to be exempted from the tax, then the State of Maryland, in fairness to the private agencies engaged in similar activities, would probably have to abandon the tax. If this were not done the continuation of the tax would constitute a clear discrimination against these private agencies, such as State Banks, Insurance Companies, Mortgage Companies, Building and Loan Associations and other similar private lending

[5] In the brief filed for the United States, as intervenor, in *Loomis vs. First Federal Savings and Loan Association*, No. 277, October Term, 1938, (dismissed on motion of the petitioners) it is stated that there are "38 separate agencies of the United States engaged in credit operations of one form or another; * * * 15 have their funds contributed entirely by the United States or another of its agencies, 19 have both public and private investment by subscription or loans, and 4 have no public funds invested in them. * * * The federal credit agencies number over 15,000 separate corporations or organizations. Their total assets, excluding the investments of one federal agency in another, are about $44,000,000,000". About $30,000,000,000 of this total is represented by assets of national banks. These various agencies are listed and classified at pages 11-15 of the government's brief. How many of these organizations are operating in the State of Maryland, or to what extent any of them would be affected by the recordation tax, we do not know.

agencies operating in the same field. The question presented is, therefore, one of the utmost importance to the State of Maryland and one that vitally affects a substantial source of revenue.

The primary purpose of the Home Owners' Loan Corporation is to assist home owners who, because of unfortunate circumstances, are in default on mortgages on their homes. The purpose of the Maryland recordation tax is to raise revenue with which the State may give aid to an even more necessitous group of persons, most of whom have no homes to mortgage, who, by reason of tender years, blindness, sickness, unemployment, old age or other disability, are incapable of self-support. It would produce a bitter paradox if it were held that the tax levied by the State to raise revenue for these purposes was unconstitutional because it might indirectly increase the interest charges of a less necessitous class of Maryland citizens.

We do not think it is necessary to reach any such result. It seems to us clear that the Maryland tax may be sustained without in anyway interfering with the Federal function. We are not contending that the Home Owners' Loan Corporation is not a governmental agency and instrumentality.[5] But we do most earnestly contend that there is no immunity from the Maryland recordation tax on mortgages to the Home Owners' Loan Corporation because:

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[5] In *Kay vs. U. S.*, 303 U. S. 1, and in *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577, the Court assumed that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal government. For the purposes of this case we make the same assumption. We also assume that the Home Owners' Loan Corporation was validly created by a mere resolution of the Federal Home Loan Bank Board.

1. The tax is uniform and does not discriminate against the Home Owners' Loan Corporation or the United States.

2. The tax is not a burden on the Home Owners' Loan Corporation since it could be, and customarily is, paid by the mortgagor.

3. If the tax is paid by the mortgagor, the effect on the Home Owners' Loan Corporation of collecting the tax from the mortgagor, and the slight increase in the cost of its operations which this might entail, is so speculative, remote and uncertain as to constitute no burden at all in the constitutional sense.

4. Even if the tax were required to be paid by the Home Owners' Loan Corporation, it would not be immune from the tax because the activities carried on by the Home Owners' Loan Corporation are such that a nondiscriminatory tax of this character laid upon it, as well as upon private agencies operating in the money lending field, would not retard, impede or obstruct the operations of the Home Owners' Loan Corporation.

5. The Home Owners' Loan Act of 1933 does not confer upon the Home Owners' Loan Corporation an immunity from the Maryland recordation tax.

6. If the Home Owners' Loan Act of 1933 must be construed to confer upon the Home Owners' Loan Corporation an immunity from the Maryland recordation tax then the Act is, to that extent, unconstitutional and void because the Congress has no power to confer upon agencies of the Federal government an immunity from State taxation which is broader and more extensive than the implied constitutional immunity.

The doctrine of the implied immunity of a Federal governmental agency from burdensome taxation by a State, and of the similar immunity of State governmental agencies from burdensome taxation by the Federal government first appeared in the decision of Chief Justice MARSHALL in *M'Culloch vs. Maryland*, 4 Wheat. 316. Since then this Court has had to deal with many varied aspects of the problem in numerous cases. No good purpose would be served by reviewing all of these cases, or even the greater part of them. An exhaustive review of the principal cases was recently before this Court[7] and many of the earlier cases, and even some of the fairly recent cases, have been overruled.[8] We will therefore confine our discussion to the cases decided in the past few years and a few of the earlier cases in which the decisions were based upon principles still regarded as sound.

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[7] See brief of the Solicitor General as amicus curiae in *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

[8] *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376, overruling *Gillespie vs. Oklahoma*, 257 U. S. 501 and *Burnet vs. Coronado Oil and Gas Co.*, 285 U. S. 393; *James vs. Dravo Contracting Co.*, 302 U. S. 134, limiting *Panhandle Oil Co. vs. Mississippi*, 277 U. S. 218, *Indian Motorcycle Co. vs. United States*, 283 U. S. 570, and *Graves vs. Texas Company*, 298 U. S. 393, and distinguishing many other cases and which Mr. Justice Roberts said, in dissenting, "overruled, sub silentio, a century of precedents"; *Helvering vs. Gerhardt*, 304 U. S. 405, overruling *Brush vs. Commissioner*, 300 U. S. 352, and of which Mr. Justice Butler, in dissenting, said "expressly or sub silentio, it overrules a century of precedents; and *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577, overruling *Collector vs. Day*, 11 Wall. 113, *New York ex rel. Rogers vs. Graves*, 299 U. S. 401, and *Dobbin vs. Commissioners of Erie County*, 16 Pet. 435.

ARGUMENT.

I.

FEDERAL LAND BANK VS. CROSLAND IS NO LONGER A BINDING AUTHORITY.

The decision of the lower Court is based squarely and solely upon the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, where an Alabama recordation tax was held invalid as applied to a mortgage to the Federal Land Bank of New Orleans. It is possible to argue that the *Crosland* case may be distinguished from the case at bar on several grounds. The Alabama statute there involved imposed the tax on the lender whereas the Maryland tax is imposed on the privilege of recording an instrument and the statute is silent as to who shall pay the tax. It is, of course, customarily paid by the borrower, and it is within the power of the lender in every case to avoid payment of the tax by requiring its payment by the borrower. It is true that in the *Crosland* case the contention was made that the tax there under consideration might be collected by the lender from the borrower and this Court in its opinion stated that this made no difference. But the fact remains that the Alabama tax was a tax required to be paid by the lender who was also required to file a certificate that the tax was paid by him. Neither of these things is required by the Maryland statute. Likewise the decision in the *Crosland* case depended upon the provision of the Federal Farm Loan Act which declared the mortgages of Federal Land Banks to be instrumentalities of the government of the United States and, as such, exempt from Federal, State, municipal and local taxation. There is no such provision in the Home Owners' Loan Act of 1933. The Home Owners' Loan Corporation is

declared to be an instrumentality of the United States but its mortgages are not declared to be such instrumentalities, although its "loans and income" are declared to be exempt from taxation.

However, we do not think these distinctions should be controlling on the question of the tax immunity of the Home Owners' Loan Corporation and, as we pointed out in our brief in support of our petition for a writ of certiorari, we rest our argument on broader considerations. In that brief we said that we were willing to concede that if the *Crosland* case is still to be considered as a binding precedent in spite of the recent decisions of this Court,* then the decision of the Court below was correct. The Solicitor General concluded his brief in opposition by saying that "unless the court wishes to re-examine *Federal Land Bank vs. Crosland, supra*, the petition should be denied". This Court granted certiorari and we therefore conclude that the Court does wish to re-examine and re-consider the decision in the *Crosland* case in the light of the more recent decisions of the Court and particularly the decision in *Graves vs. New York, ex rel. O'Keefe*, — U. S. —, 83 L. Ed. 577, decided while the petition for a writ of certiorari in the case at bar was pending. In our argument we are therefore assuming that the decision in the *Crosland* case is not in itself a binding precedent and that its authority depends entirely upon the force of its reasoning. We contend that the *Crosland* case was erroneously decided, that it

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* *James vs. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Co. vs. State Tax Commission of Washington*, 302 U. S. 186; *Atkinson vs. State Tax Commission of Oregon*, 303 U. S. 20; *Helvering vs. Mountain Producers Corporation*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; and *Allen vs. Regents of University System of Georgia*, 304 U. S. 439, were referred to and since then *Graves vs. New York ex rel. O'Keefe* .... U. S. ....., 83 L. Ed. 577, has been decided.

is out of harmony with correct principle and that it should be overruled.[10]

Apparently the question in the case at bar was not clearly presented to the Court in the *Crosland* case. It was assumed, if not conceded, that if the Alabama statute imposed a tax on the Federal Land Bank it was invalid. The entire argument for the State of Alabama seems to have been that the charge was not a tax which the Federal Land Bank was required to pay in any event, but was merely a charge which it was obliged to pay if it wished to avail itself of the Alabama system of recording deeds and mortgages. There was no consideration of the question of whether the tax was discriminatory or of whether it imposed a direct burden on the Federal Land Bank. The Court quoted the Federal statute exempting the Federal Land Bank mortgages from tax and said: "The validity of this provision is not questioned. * * * Of course, therefore, it must prevail over any inconsistent laws of a state." This is the only part of the opinion which in any way bears on the question of the implied constitutional immunity of a Federal agency from taxation by a State.

The only authority cited by the Court in that connection was *Smith vs. Kansas City Title and Trust Co.*, 255 U. S. 180, and that case is certainly no authority, one way or the other, on the question presented by the case at bar. There the principal question under consideration was the constitutionality of the Federal Farm Loan Act of 1916. In upholding the constitutionality of that

[10] In two other cases state courts have held mortgages of the Federal Land Banks and the Home Owners' Loan Corporation exempt from state recordation taxes, but both of these cases were decided upon the authority of the *Crosland* case. See *Home Owners' Loan Corporation vs. Anderson*, 145 Kan. 209, 64 Pac. (2d) 14, and *Federal Land Bank vs. Hubbard*, 163 Va. 860, 178 S. E. 16.

Act the Court, on the authority of *M'Culloch vs. Maryland*, 4 Wheat. 316, held that the Congress had some power to grant an exemption from State tax to its governmental agencies but neither the extent of the power nor the extent of the exemption from taxation was considered or discussed.

We therefore respectfully submit that the question in the case at bar should be considered as an open one, not governed by the *Crosland* case, but to be determined in accordance with the basic principles applied in the recent decisions of this Court.

II.

THE TAX IS UNIFORM AND NOT DISCRIMINATORY AND THEREFORE NOT PROHIBITED.

As early as *M'Culloch vs. Maryland*, 4 Wheat. 316, it was recognized that the question of whether or not a State tax discriminated against a Federal agency was of vital importance in determining whether there was an implied constitutional immunity from the tax. It will be remembered that the tax there involved was clearly a discriminatory tax levied by the State of Maryland against the Bank of the United States. Although the tax was levied against "all banks, or branches thereof, in the State of Maryland, not chartered by the legislature", it was obviously directed against the Bank of the United States and designed to hamper and impede its operations. It is significant that in holding that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government", Chief Justice MARSHALL took occasion to say:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not

extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." (4 Wheat. 436.)

In other words, a tax on the operations of the bank which would retard, impede or burden it in the discharge of its governmental functions was unconstitutional and void; but a non-discriminatory tax on the property of the bank, which could not have this effect, was constitutional, and valid.[11] It might well be argued that a non-discriminatory tax could never be burdensome in the constitutional sense and hence that there could be no constitutional immunity from a non-discriminatory tax. However, it is not necessary for us to go so far in this case and candor compels us to admit that in no case has it flatly been said that a non-discriminatory tax is, in all instances, valid and in some cases the question of whether or not the tax was discriminatory has been lost sight of.[12]

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[11] In two other early cases much relied upon in subsequent cases, the challenged tax was clearly discriminatory. See *Osborn vs. United States Bank*, 9 Wheat. 738, and *Weston vs. City Council of Charleston*, 2 Pet. 449.

[12] So far as we know the Supreme Court in only a few cases has expressly rejected the argument that a non-discriminatory tax is valid. In *New York ex rel. Bank of Commerce vs. Commissioners of Taxes*, 2 Black 620 and *New York ex rel. Bank of the Commonwealth vs. Commissioners of Taxes*, 2 Black 635, decided the same day, the Court held a non-discriminatory New York tax on the capital stock of New York banks invalid to the extent that Federal securities owned by the bank were included in computing the valuation of the capital stock subject to the tax. In *Johnson vs. Maryland*, 254 U. S. 51, 55, dealing with the right of the State of Maryland to require a Post Office employee to obtain a chauffeur's license Mr. Justice Holmes said: "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has geen regarded as established since *M'Culloch vs. Maryland*, 4 Wheat. 316". But compare *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506 and *Schuylkill Trust Co. vs. Pennsylvania*, 296 U. S. 113, where it was held that a State tax upon corporate shares, as distinguished from a tax upon the assets constituting the value of the shares, was not invalid even though Federal securities were included in determining the value of the corporate shares.

Nevertheless, in almost all of the more recent cases involving this question the non-discriminatory feature of the tax has been referred to,[13] and in many of the cases it has been stressed as a factor of major importance.[14] The fact that a challenged tax was not discriminatory has also been relied upon by dissenting Justices.[15]

In his dissenting opinion in *Brush vs. Commissioner of Internal Revenue*, 300 U. S. 352, 375, Mr. Justice ROBERTS apparently gives equal weight to the question of whether or not the challenged tax is discriminatory and the question of whether or not the challenged tax constitutes a burden upon the governmental agency. He said:

> "It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote."

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[13] See *Denman vs. Slayton*, 282 U. S. 514; *Group No. 1 Oil Corp. vs. Bass*, 283 U. S. 279; *Educational Films Corp. vs. Ward*, 282 U. S. 379, *Fox Films Corp. vs. Doyal*, 286 U. S. 123; *Indian Territory Illuminating Oil Co. vs. Board of Equalization*, 288 U. S. 325; *Burnet vs. A. T. Jergins Trust*, 288 U. S. 508; *Federal Compress Co. vs. McLean*, 291 U. S. 17; *James vs. Dravo Contracting Co.*, 302 U. S. 134.

[14] See *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514; *Willcuts vs. Bunn*, 282 U. S. 216; *Pacific Co. vs. Johnson*, 285 U. S. 480; *Taber vs. Indian Territory Illuminating Oil Co.*, 300 U. S. 1; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; *Graves vs. New York, ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

[15] See *Long vs. Rockwood*, 277 U. S. 142; *National Life Insurance Co. vs. United States*, 277 U. S. 508; *Macallen Co. vs. Mass.*, 279 U. S. 620.

Entirely apart from the force of its own reasoning, the dissenting opinion of Mr. Justice ROBERTS in the *Brush* case now has even more significance in view of the fact that the Supreme Court in later decisions first limited,[16] then expressly overruled,[17] the majority opinion in the *Brush* case. It is not necessary for us in the case at bar to establish the proposition that the fact that a tax is uniform and not discriminatory is the sole factor to be considered in determining whether or not there is any constitutional immunity from such a tax. Certain it is that the question of discrimination or lack of discrimination is strongly relied upon in the decision as to whether or not there is a constitutional immunity.

It may be that the presence or absence in a challenged tax of discrimination against a Federal agency is not so much in itself a test of whether or not there is a constitutional immunity from the tax as it is a major factor in determining whether the tax constitutes a direct and substantial burden on the Federal agency and operates to obstruct or impede its activities. This Court has often said that the constitutional immunity of either a Federal or State agency from taxation by the other sovereignty should not be extended beyond the necessities of the case and that the taxing power of the one should not be limited unless it was essential in order to avoid undue interference with the agency of the other sovereignty. If it be conceded that the grant of immunity should not be permitted to extend beyond the necessities of the case, then it becomes apparent that neither the States nor the Federal government, under the guise of a grant of immunity from taxation, should be required to confer

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[16] *Helvering vs. Gerhardt*, 304 U. S. 405.

[17] *Graves vs. New York ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

a bounty upon the other or give it a benefit not enjoyed by private persons carrying on similar operations. This was pointed out by this Court as recently as *Helvering vs. Gerhardt*, 304 U. S. 405, where this Court said:

> "The basis upon which constitutional tax immunity of a State has been supported is the protection which it affords to the continued existence of the State. To attain that end it is not ordinarily necessary to confer on the State a competitive advantage over private persons in carrying on the operations of its government". (304 U. S. 421.)

It might be said that a discriminatory tax against a federal agency in and of itself, and solely by reason of the fact that it is discriminatory, imposes an unconstitutional burden on the Federal agency, but that a non-discriminatory tax is prima facie valid and the burden is then upon him who claims a constitutional immunity to show that, notwithstanding the tax is not discriminatory, it nevertheless imposes a direct and substantial burden on the operations of the governmental agency. In other words, the absence of discrimination perhaps does not in itself require the rejection of an asserted claim for immunity but it is a factor of primary importance in determining whether or not the tax is burdensome.

The Maryland tax under consideration is uniform and clearly not discriminatory. It is required to be paid by every person offering for record and recording a mortgage, deed and many other instruments of writing. The tax applies not only to private persons, it applies as well to instrumentalities of the State of Maryland. The tax is required to be paid upon the recording of a deed from a County Tax Collector to the County Commis-

sioners[18], the recording of a deed to a municipality of the State of Maryland[19], and the recording of a deed to the State Roads Commission, an agency of the State of Maryland.[20] Under no circumstances can the Maryland tax be said to be discriminatory and while we do not contend that this is conclusive in the case at bar, we do most strongly urge that it is a factor of major importance and requires the government to establish clearly that, notwithstanding the lack of discrimination, the tax is a burden on its operations.

III.

THE TAX IS NOT A BURDEN ON THE HOME OWNERS' LOAN CORPORATION.

A.

The Rule Announced in the Earlier Cases.

It is difficult, if not impossible, from an examination of the numerous decisions on the question to state with any certainty a rule by which it could be determined whether a tax sought to be imposed upon a governmental agency is so direct and burdensome as to be invalid. And in view of the recent restatements of the correct principle, no useful purpose would be served in making an exhaustive review of these numerous cases. Never-

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[18] So ruled by the Attorney General of Maryland in an opinion dated July 14, 1937, to the Clerk of the Circuit Court for Allegany County reported in Volume 22 of the Report and Official Opinions of the Attorney General of Maryland at page 722. Upon like reasoning the Attorney General ruled that a mortgage to the Federal Reserve Bank of Richmond was not exempt from the tax. 22 Report and Official Opinions of the Attorney General, page 602.

[19] So held by Chief Judge Dennis of the Supreme Bench of Baltimore City in an opinion on July 16, 1937 filed in the Baltimore City Court in the case of *Mayor and City Council of Baltimore vs. Little, Clerk of the Superior Court of Baltimore City.* This opinion is not officially reported but was printed in the Daily Record, a legal publication in Baltimore City, on July 20, 1937. The case was not appealed.

[20] See 22 Report and Opinions of the Attorney General of Maryland, page 600.

theless, a few of the earlier cases stated with such clarity the basis for the immunity, we think it would probably be helpful to refer to them.

All discussion of this problem must necessarily begin with the decision of Chief Justice MARSHALL in *M'Culloch vs. Maryland*, 4 Wheat. 316. That case has been discussed so frequently that it is not necessary to review it in any detail. But several of the statements made by the Chief Justice in the course of his opinion are well worth repeating. At the very outset of his discussion of the question, he said:

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." (4 Wheat. 425).

And in summing up his opinion he said:

> "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." (4 Wheat. 436.)

In *Union Pacific Railroad vs. Peniston*, 18 Wall. 5, 30, Mr. Justice STRONG said:

> "But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its

operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

In *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514, 523-524, Mr. Justice STONE said:

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of Federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the Federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax

> * * * or the appropriate exercise of the functions of the government affected by it. * * *
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> "While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

In *Willcuts vs. Bunn*, 282 U. S. 216, 225, Chief Justice HUGHES said:

> "The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government."

In *Educational Films Corp. vs. Ward*, 282 U. S. 379, 391-392, Mr. Justice STONE again said:

> "This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumen-

talities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

And in *Fox Film Corp. vs. Doyal*, 286 U. S. 123, 128, Mr. Chief Justice HUGHES said:

"Where the immunity exists, it is absolute, resting upon an 'entire absence of power' * * * but it does not exist where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government' * * *".

And again in *Indian Territory Illuminating Oil Co. vs. Board of Equalization*, 288 U. S. 325, 327-328, Mr. Chief Justice HUGHES said:

"There is a recognized distinction between a non-discriminatory tax upon the property of an agent of government, albeit the property is used in, or has relation to, the business of the agency—where there is only a remote, if any, influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the exertion of governmental powers".

And Mr. Justice CARDOZO, dissenting in *Schuylkill Trust Co. v. Pa.*, 296 U. S. 113, 127, said:

"A sterile formalism would quickly lead to an impasse, and the activities of the states checked because of an indirect effect upon the agencies of the

federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way if government is to go on at all."

In the fairly recent case of *United States v. California*, 297 U. S. 175, dealing with the question of whether or not a State owned railroad was subject to the Federal Safety Appliance Act, Mr. Justice STONE said:

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it."

It will be noted that in all of these cases the Court has clearly recognized the necessity of avoiding an extension of the immunity from tax for fear of crippling the taxing power of either the States or the Federal government. The immunity exists only to the extent necessary to prevent undue interference with the operations of the States by the Federal government, or undue interference by the States with the operations of the Federal government. The Court has clearly established the rule that no tax burdens the operations of the governmental instrumentality unless the tax has a direct and immediate affect upon the operations of the governmental instrumentality and operates to restrict, retard, impede or

obstruct its activities. It is not sufficient that the tax merely increases the cost of carrying on the governmental activity.[21] To constitute a burden so as to be within the implied constitutional prohibition, the tax must have the effect, in some degree, of preventing the governmental agency from carrying on its activities. It is not easy to draw the line between what constitutes a burden and what does not and almost all of the cases on the question have turned upon the question of whether, under the particular facts of the case, the tax was a burden so direct and substantial that it clearly interfered with the functions of the governmental agency.

During the past two terms the Court, while adhering to the same principle that the tax must constitute a direct and substantial burden to be invalid, has, nevertheless, indicated that a different concept of what constitutes a burden now prevails. In so doing, the Court has upheld taxes which heretofore had been thought to constitute a burden and has overruled many decisions holding such taxes invalid on the ground that they constituted an unlawful burden. The Court has therefore indicated a tendency to enlarge rather than restrict the power to tax and to confine within much narrower limits the implied constitutional immunity from taxation enjoyed by governmental agencies. The decision of the case at bar therefore turns, we think, on the cases decided within the past two years rather than upon the numerous earlier decisions of this Court.

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[21] See *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514; *Group No. 1, Oil Corp. vs. Bass*, 283 U. S. 279; *Burnet vs. A. T. Jergins Trust*, 288 U. S. 508; *James vs. Dravo Contracting Co.*, 302 U. S. 134; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; and *Graves vs. New York ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

B.

The Recent Decisions of This Court.

We rely most strongly upon the decisions of this Court in *James vs. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. vs. State Tax Commission of Washington*, 302 U. S. 186; *Atkinson vs. State Tax Commission of Oregon*, 303 U. S. 20; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; *Allen vs. Regents of University System of Georgia*, 304 U. S. 439; and *Graves vs. New York ex rel O'Keefe*, U. S. , 83 L. Ed. 577, to sustain our contention that the Home Owners' Loan Corporation has no immunity from the Maryland recordation tax. All of these cases were decided within the past two years and in each of them this Court has found that the challenged tax did not impose such a direct, substantial burden as to bring it within the constitutional prohibition. From a reading of these cases it is clear that the Court has suggested a different approach to the problem and that the present tendency is to scrutinize carefully any claim to immunity and allow it only when it is abundantly clear that to disallow the claim to immunity would be to impose an unreasonable burden on a governmental agency. This is particularly true where the immunity, if allowed, would result in a benefit to a private person, but where the burden, if any, on the governmental agency was remote, speculative and uncertain. It is our contention that this situation exists in the case at bar and that the burden, if any, upon the Home Owners' Loan Corporation is remote, uncertain and speculative.

These cases have been so recently decided that it is hardly necessary to review in detail the situation presented in each of them. In the *Dravo* and *Silas Mason*

Co. cases the Court upheld a state tax on the gross receipts of a government contractor. In the *Atkinson* case the Court upheld a state tax on the net income of a government contractor even though the income received by the contractor from the Federal government was included in his gross income before calculating his net income. In the *Mountain Producers Corp.* case the Court overruled two earlier decisions and held that the lessee of state owned oil lands was subject to the Federal income tax. In the *Gerhardt* case the Court held that an employee of the Port of New York Authority was not immune from a Federal income tax on his salary. In the *University of Georgia* case the Court held that the admissions charged by the University of Georgia to football games were subject to the Federal admissions tax even though the proceeds of such admissions were used to a large extent for educational purposes which were admittedly governmental in their nature. And in the *O'Keefe* case the Court held that the salary of an employee of the Home Owners' Loan Corporation was not immune from the income tax imposed on the employee by the State of New York.

In the *Dravo* case Mr. Chief Justice HUGHES said:

> "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

And in the *Gerhardt* case Mr. Justice STONE said:

> "With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the

states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every Federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation."

In the *O'Keefe* case Mr. Justice STONE again said:

"The only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

And in speaking of the *Gerhardt* case, Mr. Justice STONE said:

"It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the

other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. * * * It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits by relieving them from contributing their share to the financial support of the other government whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other. * * * The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

In some of the earlier cases the Court indicated that any tax which in any way affected a governmental agency of the Federal government was invalid, but it is abundantly clear that this is not the test laid down in the recent decisions above referred to. It may safely be said that a tax imposed on a governmental agency is not invalid unless the burden of the tax be "palpable and direct" rather than "hypothetic and remote" and a state tax is not a burden on the government if it

does "not interfere in any substantial way with the performance of Federal functions". Immunity does not exist unless the burden on the Federal agency is actual and substantial and not merely conjectural. The Court is not concerned with any "speculative and uncertain" economic effect which a tax may have on a governmental agency.

C.

The Maryland Recordation Tax Is Not a Burden.

There can hardly be any doubt but that the burden of the Maryland recordation tax on the Home Owners' Loan Corporation, if it exists at all, is wholly speculative, uncertain and conjectural. Indeed it would seem to be clear that the tax is actually no burden at all on the Home Owners' Loan Corporation. Certainly the tax is not levied against the corporation even though it may be paid by the corporation. If immunity from the tax is granted to the corporation, its borrowers, who are citizens and residents of the State of Maryland and owners of property therein, will benefit but the corporation will certainly not benefit. Any contention to the contrary simply ignores the facts. It is clear that the claimed immunity would do no more than relieve residents of Maryland from the duty of financial support to the State of Maryland in order to secure to the Home Owners' Loan Corporation a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from the tax.

If the tax is in effect paid by the borrower what possible burden can there be on the Home Owners' Loan Corporation? The case is even clearer than the *Ger-*

hardt and *O'Keefe* cases. In those cases it could be and was argued that the income tax on the employees of the Port of New York Authority in the one case and the Home Owners' Loan Corporation in the other increased the expense of operation of these governmental agencies. Yet this Court held that the supposed burden was too conjectural and remote and infringed no constitutional immunity. But in the case at bar not even this conjectural and remote burden exists. The tax does not, either directly or indirectly, increase the cost of operation of the Home Owners' Loan Corporation. Not even the economic burden of the tax is passed on to it. The only advantage which can be derived by the Home Owners' Loan Corporation from a grant of immunity is a purely competitive advantage over private lending agencies resulting from the bounty accruing to those who borrow from the Home Owners' Loan Corporation. This is so, because in practice the recordation tax on a mortgage is paid by the mortgagor. No part of the tax need be paid by the Home Owners' Loan Corporation. Its only function in connection with the tax is to require its borrower to pay the tax in order that the mortgage may be recorded.

It might be argued that the obligation of collecting the tax from the borrower and paying it to the clerk of the Court upon the recordation of the mortgage is in itself a burden on the Home Owners' Loan Corporation and an interference with its operations. It may very well be that in some infinitesimal degree the cost of operation of the Home Owners' Loan Corporation is increased by the necessity imposed upon it to collect the tax from the borrowers and pay it to the State. Certainly, however, the economic effect of this simple burden upon the Home

Owners' Loan Corporation is much less capable of measurement than the economic effect on the Home Owners' Loan Corporation of a state income tax imposed upon its employees, which this Court held to be too remote, conjectural and uncertain to be considered. As a matter of fact, the small duty thus imposed upon the Home Owners' Loan Corporation would probably not increase its expense of operation in any degree. The tax would be collected from the borrower at the time the mortgage loan was consummated. The Home Owners' Loan Corporation usually employs attorneys for this purpose and it could hardly be seriously contended that the fees of such attorneys are increased because of the slight additional work involved in collecting the tax from the borrower and paying it to the State.

D.

The Nature of the Function Performed by the Home Owners' Loan Corporation Must Be Considered.

Even if the Maryland recordation tax were levied directly against the Home Owners' Loan Corporation and required to be paid by that Corporation, it is our contention that the tax would nevertheless be valid. There would be no implied constitutional immunity from even such a direct tax because the tax, even though it were required to be paid by the Home Owners' Loan Corporation, would not operate to hamper, impede or obstruct the Home Owners' Loan Corporation in the performance of the governmental functions delegated to it by the Act of Congress. This is so because of the nature of the functions exercised by the Home Owners' Loan Corporation which must necessarily be considered in determining whether or not a tax operates to hamper,

impede or obstruct the performance of these functions, so as to constitute an unlawful burden upon it.

In dealing with the question of the immunity of State agencies from Federal taxation, this Court has distinguished between agencies exercising governmental functions and those exercising proprietary functions. While recognizing that immunity from Federal taxation exists in the case of those State agencies which exercise governmental functions, this Court has refused to recognize that any such immunity exists in the case of State agencies which exercise proprietary functions. The distinction is made in *South Carolina vs. United States*, 199 U. S. 437, where a Federal tax on a State owned liquor dispensary was upheld, and is again even more sharply drawn in *Allen vs. Regents of University System of Georgia*, 304 U. S. 439, where the Court held that admissions to football games between educational institutions were subject to the Federal admissions tax even though the proceeds of such admissions were used for educational purposes, which purposes were admittedly of a governmental nature. It must not be forgotten that the whole purpose and object of the distinction, as first applied in the *South Carolina* case, and strongly emphasized in the *University of Georgia* case, was to preserve to the Federal government those sources of tax revenue to which it had theretofore resorted. The motive of the Court was to preserve the taxing power of the Federal government, in a period marked by an extension of State activity into fields theretofore occupied exclusively or primarily by private enterprise. The argument applies with equal or greater force in a period like the present, which is marked by a tremendous expansion of Federal activity in fields, such as the lending field, heretofore

occupied by private enterprise. See note 49 Harvard Law Review 1323.

In the *Gerhardt* and *O'Keefe* cases the Court has apparently adopted the view that in dealing with Federal agencies no distinction is to be made between those exercising proprietary functions and those exercising governmental functions. The argument is that since the Federal government is a government of delegated powers and since the laws passed by Congress within its constitutional sphere of action are the supreme law of the land, any agency created by Congress in the exercise of the powers expressly or impliedly delegated to it by the Constitution is necessarily a governmental agency. Granted that for all practical purposes the constitutional power of Congress is as broad as the power of the States, to set up proprietary agencies in the general welfare, the problem of protecting the taxing power of the States and preserving the balance of Federal-State relations still remains.

The conclusion that either a State agency or a Federal agency is exercising governmental functions does not preclude further inquiry into the question of whether or not such a governmental agency, either State or Federal, can assert an implied constitutional immunity from a particular tax. This is made abundantly clear by both the *Gerhardt* case and the *O'Keefe* case. In the *Gerhardt* case, the conclusion was reached that the Port of New York Authority was a State governmental agency and in the *O'Keefe* case the conclusion was reached that the Home Owners' Loan Corporation was a Federal governmental agency. Nevertheless, in each of these cases the Court deemed it necessary to consider whether or not an income tax levied upon the salaries of the employees of

each of these two governmental agencies constituted a burden upon the agency. The Court concluded that the tax did not constitute a burden and accordingly held that there was no implied constitutional immunity from the tax in either case. In other words, it is entirely possible that an agency, either State or Federal, admittedly governmental in its nature, may not be immune from a particular tax.

The distinction drawn, in the case of State agencies, between those exercising proprietary functions and those exercising governmental functions seems to come to no more than this. In the case of those State agencies which the Court finds are exercising merely proprietary functions, it is not necessary for the Court to inquire whether a particular tax imposed upon such agencies is or is not a burden. There is no implied constitutional immunity from the tax regardless of the fact that it may impose a most exacting burden. On the other hand, if a State agency is exercising a governmental function, there may be a constitutional immunity from the tax and it is then necessary for the Court to inquire whether or not the challenged tax does in fact impose a direct and palpable burden upon the State agency. If so, there is an implied constitutional immunity; if not, there is no immunity. The only difference to be noted in dealing with Federal agencies is that the Court does not consider that any of such agencies may not be governmental agencies and hence it is necessary in each case involving a tax upon a Federal governmental agency to inquire whether or not the tax in fact does impose a direct and palpable burden upon the Federal agency. If so, there is an implied immunity from the tax; if not, there is no immunity from the tax.

In the case at bar we are concerned with the question of whether a Federal agency has an immunity from a particular tax. We concede that the Home Owners' Loan Corporation is a Federal governmental agency and hence an agency which *may* be entitled to a constitutional immunity from tax, but this does not mean that the Court is precluded from any inquiry into the nature of the function exercised by the Home Owners' Loan Corporation. Even though the Home Owners' Loan Corporation is a governmental agency, it is still necessary to determine whether or not the challenged tax imposes a direct and palpable burden upon it. Manifestly, the Court cannot determine whether or not the tax does impose a direct and palpable burden upon the Federal agency, so as to retard, obstruct or impede it in the performance of the functions delegated to it by Congress, without acquainting itself with the nature of the function. In other words, the Court must ascertain with considerable exactness the nature of the function to be exercised by the Federal governmental agency in order to determine whether or not the challenged tax operates to restrict, obstruct, retard or impede the performance of that function, and conversely, whether the benefit to be derived from immunity is outweighed by the detriment to the State, which is cooperating with the Federal government in the attainment of common governmental ends.

Whether we call Federal agencies governmental or proprietary in their nature can make no difference. The immunity from tax cannot be conferred by the label we give to the agency asserting the immunity. A nondiscriminatory tax levied alike upon a governmental agency, as well as upon all private agencies engaged in similar activities, may very well be considered not a burden upon the Federal agency.

If the contrary view is adopted, it would necessarily result that almost every tax which in any way, no matter how indirectly and remotely, affected the operations of a Federal agency, would be invalid to that extent. The consequences of any such decision are immediately apparent. We cannot close our eyes to the fact that the Federal Government is daily broadening the sphere of its activities. It is constantly setting up agencies which compete with private agencies engaging in similar activities. Carried far enough, an immunity from tax would result in a very serious drying up of the States' sources of revenue. Certainly no such result is required by any decision of this Court and it is not necessary that such a result be achieved in order to protect the Federal government in the performance of the functions delegated to it by the Constitution.

It must constantly be remembered that this Court has always sought, in order to preserve our dual system of government, to avoid unnecessary encroachment by the one government upon the field of activities consigned to the other. To the extent that it is necessary to accomplish this purpose, the governmental agencies of the Nation have an implied constitutional immunity from tax by the States, but this immunity can extend no further than the necessity of the case requires. A decision that a Federal agency engaging in activities in competition with private industry has an immunity from *all* taxation by a State goes far beyond the necessities of the case. The grant of immunity is not necessary to protect the agency in such a case. It would constitute a bounty which the State would be forced to contribute to the Federal agency and would operate to deprive the States of legitimate sources of revenue. In the final

analysis, no advantage would accrue to the Nation as a whole.

In the case at bar it seems to be entirely clear that the net result of granting the immunity would be to deplete the State's revenue, and impair its ability to match Federal funds in the field of social security, and to give aid to its most destitute citizens. At most, the only gain to the Federal government would be in a reduction pro tanto, in the cost of its lending operations, which it might pass on to borrowers in lowered interest rates, or use for other purposes. That a slight and indeterminate increase in costs of operation is no ground for immunity, was expressly decided in the *O'Keefe* case. In the case at bar, we have the further consideration that any immunity enjoyed by a Federal agency operates to the disadvantage of competing, private lending agencies. It may be urged that only necessitous borrowers are accommodated by the Home Owners' Loan Corporation, but this argument can hardly apply to such agencies as the Reconstruction Finance Corporation or the National Banks.

Bearing in mind that the Maryland tax is not discriminatory and therefore does not on its face impose a burden upon the Home Owners' Loan Corporation, what facts are alleged to substantiate the claim to immunity? Although the petition for mandamus alleges that the tax "is an unlawful interference with the lawful operations of your petitioner, placing a burden, impediment, and obstruction upon its functions and thus operating to hinder, delay and embarrass your petitioner in the exercise of the duties imposed upon it by the law of the Congress of the United States" (R. 3), no attempt is made to show in what way or to what degree that tax is an unlawful interference with the operations of the Home Owners' Loan Corporation or in what manner it places

a burden, impediment or obstruction upon its functions. These matters are left wholly to conjecture. If, as we have argued, the fact that the tax is non-discriminatory creates a presumption in favor of its validity, throwing upon him who claims an immunity the responsibility of showing that the tax operates to impede or obstruct the functions of the government, then certainly the respondent has failed to meet the duty thus cast upon it. Such burden as is assumed, rather than shown to exist, is most certainly hypothetic and remote. The truth of the matter is that no attempt is made to show in what manner the tax operates to obstruct or impede the operations of the Home Owners' Loan Corporation because it cannot be shown that such is the case, and any attempt to do so must fail. This being the case the claimed immunity must likewise fall.

We respectfully submit that the Maryland recordation tax imposes no direct and palpable burden upon the Home Owners' Loan Corporation and therefore mortgages on Maryland property from residents of Maryland to the Home Owners' Loan Corporation are not exempt from the Maryland recordation tax.

IV.

CONGRESS HAS NOT CONFERRED UPON THE HOME OWNERS' LOAN CORPORATION AN IMMUNITY FROM THE MARYLAND RECORDATION TAX.

A.

The Home Owners' Loan Act of 1933 Does Not Confer Such an Immunity.

In *Graves vs. New York, ex rel. O'Keefe, supra*, the Court said:

> "There has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation."

The respondent claims that the Home Owners' Act of 1933 has granted an immunity from the Maryland recordation tax. The petitioner asserts that the Home Owners' Act of 1933 does not purport to grant such an immunity. The respondent relies upon that part of Section 1463(c) of the Act which provides as follows:

> "The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

It seems to us clear that the taxes from which immunity is thus expressly granted by the Act of Congress are taxes levied directly against the Home Owners' Loan Corporation or its personal property. In the case at bar there is no tax levied directly against the Home Owners' Loan Corporation or its property. It is, of course, obvious that the recordation tax is not a tax on the franchise of the corporation or its capital, reserves and surplus, or its income. It is contended, however, that it is a tax on the loans of the corporation.

The short answer to this contention is that the tax, as we have pointed out above, is not imposed upon the Home Owners' Loan Corporation nor required to be paid by it. In practice the tax is paid by the borrower. Manifestly, therefore, the tax is not imposed upon the corporation with respect to its loans even if it were conceded that the loans and the mortgages of the Home Owners' Loan Corporation are one and the same thing.

The mortgage is, of course, the evidence of the loan and we would concede that a direct property tax levied upon the mortgages held by the Home Owners' Loan Corporation would be a tax intended to be prohibited

by the Act of Congress, although, even in that case, the question of whether the tax constituted a burden would still be open. The Maryland recordation tax is, however, not such a tax. It is not a recurring tax required to be paid annually nor a tax levied upon either the Home Owners' Loan Corporation or its borrower with respect to the ownership of property. It is purely an excise tax levied upon the privilege of recording a mortgage among the land records or chattel records of the State of Maryland. This does not seem to us to be the kind of a tax contemplated by Congress when it undertook to prohibit the States from levying a tax upon the loans of the Home Owners' Loan Corporation.

The distinction is made clear, we think, when it is realized that states do sometimes impose taxes upon loans as evidence of property. A state is not compelled to furnish a system of registry for recording of deeds and mortgages. Such a system is a service rendered by the State to the citizens for their benefit and to make more certain the titles to real and personal property and to protect persons dealing with such property. There is then, a vast difference between a tax upon a loan as property, and an excise tax upon the privilege of recording, a privilege which the state is not required to furnish. It seems to us that the former was contemplated by the Act of Congress but that the latter was not.[22]

[22] This Court has recognized similar distinctions in holding valid both State and Federal estate and inheritance taxes on the transfer at death of both State and Federal securities, even though a direct property tax on such securities would have been invalid under the decisions of this Court. See *United States vs. Perkins*, 163 U. S. 625; *Plummer vs. Coler*, 178 U. S. 115; and *Snyder vs. Bettman*, 190 U. S. 249. This Court has also recognized the distinction between a tax on real estate and a tax on the income therefrom, *New York ex rel. Cohn vs. Graves*, 300 U. S. 308, and the distinction between a tax on Federal securities and a tax on the capital stock of a corporation measured in part by the value of Federal securities owned by the corporation, *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506.

If the Act of Congress does not expressly grant an immunity from the tax there is no basis for implying an intent to Congress to exempt the Home Owners' Loan Corporation "from tax burdens which are unsubstantial or which courts are unable to determine". As said by the Court in *Graves vs. New York, ex rel. O'Keefe, supra:*

> "Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

As we shall point out, a serious constitutional question will arise if the statute is construed to prohibit a tax upon the privilege of recording deeds and mortgages. The proposition is well established, that if a statute is susceptible of two interpretations, one of which will make the statute constitutional and valid, and the other of which raises serious doubt as to constitutionality, the courts will adopt the former.[23] This being the case, the Home Owners' Loan Act of 1933 should be so construed as not to prohibit the Maryland recordation tax. Only in that way can the constitutional question which would necessarily arise if any other construction were given to the Act, be avoided.

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[23] See *Anniston Mfg. Co. vs. Davis*, 301 U. S. 337; *United States ex. La Franca*, 282 U. S. 568; *Reinecke vs. Northern Trust Co.*, 278 U. S. 339; *St. Louis Southwestern R. Co. vs. Arkansas*, 235 U. S. 350; and *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531.

We do not mean to say that if the statute is given the construction contended for by us the necessity for discussion of the question of immunity is eliminated. We would then simply have a case where Congress has given no intimation of any purpose either to grant or to withhold immunity from the tax. Whether there is an immunity from the tax would then depend entirely upon whether there was an implied constitutional immunity. See *Graves vs. New York; ex rel. O'Keefe, supra.*

B.

Congress Has No Power to Grant an Immunity of Greater Extent Than the Constitutional Immunity.

This Court in *Graves vs. New York, ex rel. O'Keefe, supra,* expressly left open the question of whether Congress could grant an immunity from taxation broader than the implied constitutional immunity, saying:

> "Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined."

Neither do we think the question need be determined in the case at bar. For as we have pointed out above, the Home Owners' Loan Act of 1933 need not be construed so as to indicate an attempt on the part of Congress to grant to the Home Owners' Loan Corporation an immunity from the Maryland recordation tax. Nevertheless, if this Court should feel that the Home Owners' Loan Act of 1933 does purport to grant such an immunity, then we strongly urge that the Act is, to that extent, unconstitutional and void, because Congress has no power to confer upon agencies of the Federal govern-

ment an immunity from State taxation which is broader and more extensive than the implied constitutional immunity.

It should suffice to point out here that even if such a power did exist in Congress in certain instances, it does not exist with respect to the Home Owners' Loan Corporation, because the only justification for such a power in Congress would be that it was necessary in order for Congress to fully carry out and perform the functions delegated to it by the Constitution. The power could, therefore, never be broader than was necessary to protect the agency created by Congress to carry out the powers expressly delegated by the Constitution to Congress. Assuming that Congress has the power to authorize the creation of the Home Owners' Loan Corporation to assist needy home owners by refinancing mortgages on their homes, it is, we submit, clear that an immunity from the Maryland recordation tax is not necessary or needful to protect the agency in the performance of that function. Consequently the power to grant immunity would be entirely lacking.

But it seems to us that the idea that Congress has any power whatsoever to grant to any of its federal governmental agencies an immunity from taxation broader and more extensive then the implied constitutional immunity, is based upon reasoning which is fallacious. As stated by the Court in the *O'Keefe* case, it is argued that the Federal government is one of delegated powers, in the exercise of which Congress is supreme so that every agency which Congress creates to carry out its purposes is a governmental agency. It is then argued that if Congress has the constitutional power to create the agency it has the implied power to protect the agency in the per-

formance of its governmental functions and that if an immunity from taxation is necessary, then Congress can grant such an immunity. But such an argument begs the question. If an immunity from taxation is necessary to protect a federal agency in the performance of a governmental function devolved upon it by Act of Congress, then any tax which interferes with the performance of the function constitutes a burden upon the Federal agency. If so, there is an implied constitutional immunity from the tax. On the other hand, if the tax does not interfere with the performance of the governmental function by the Federal agency, then it constitutes no burden on the agency and there is no implied constitutional immunity from the tax. But in this event there would be no necessity for an immunity to protect the Federal agency in the performance of its governmental functions, and it would therefore not be necessary for Congress to grant such an immunity in order to enable the Federal agency to carry on its activities. If there is no such necessity, then clearly the power to grant immunity from tax could not be derived from the implied power of Congress "to do whatever is needful or appropriate to carry out the powers delegated to it by the Federal Constitution".

As thus analyzed it will be seen that the idea that Congress has some power, the limits of which are not defined, to grant an immunity from tax broader and more extensive than the implied constitutional immunity, is without foundation.

In other words, if we concede the power of Congress to grant to a governmental agency whatever tax immunity is necessary to protect and safeguard that agency in the performance of the governmental functions dele-

gated to it by Congress, we merely concede the implied constitutional immunity of a Federal agency from taxation which substantially interferes with the performance of its governmental functions. If we go beyond this, then we must necessarily say that the Congress has the power to grant to an agency created by it an immunity from taxation, not merely to the extent that such an immunity is necessary to protect the agency in the performance of its governmental functions, but to a greater, undefined extent. If it should be said that the power of Congress to grant immunity from tax to an agency created by it is not limited to the grant of such immunity only as is necessary to protect the agency in the performance of its governmental functions, then there would be no limit whatsoever upon the power of Congress to grant immunity from taxation.

Entirely apart from the fact that there would be absolutely no justification for such a concept of the power of Congress, any such rule would have disastrous consequences because it would mean that the power of Congress to grant immunity from tax to an agency created by it would be absolute, and unrestricted by any constitutional limitation. The argument that the States, through their representatives in Congress, can prevent any undue expansion of Federal activity into fields heretofore served by private industry and initiative, loses its force in the face of existing realities. Representatives of States whose welfare depends more and more upon receiving a share of Federal funds, can hardly resist the inevitable pressure in favor of Federal immunity from State taxation. This Court has recognized the practical necessity of protecting each sovereign from an exorbitant exercise of the taxing power of the other. It can-

not consistently hold that an immoderate and unnecessary exercise of the power to exempt from tax is limited only by legislative or congressional self-restraint.

In this connection, we may quote the pertinent comment of Mr. Justice ROBERTS, dissenting in *James vs. Dravo Contracting Co., supra:*

> "No one denies the competence of the Congress to waive the immunity in whole or in part. But this is the reverse of saying the power to tax federal means and operations exists in the States subject to veto by Congress of any exorbitant exercise of the power. And it may be pertinent to suggest that if, as the Court has always held, the immunity is reciprocal, the State, by a parity of reasoning, ought to have the power to prohibit federal taxes upon State operations, if they be deemed immoderate."

The statutory declaration by Congress of immunity from tax for any particular Federal agency, need not be wholly disregarded; this Court may give it due weight as indicating the opinion of Congress as to whether any particular tax would or would not constitute such a substantial burden on the agency, as to retard, impede or obstruct its operations. Or, as was suggested in *Plummer vs. Coler*, 178 U. S. 115, 118, a statutory declaration of immunity might be treated as a manifestation that Congress did not intend to waive the implied constitutional immunity. For instance, in *Baltimore National Bank vs. State Tax Commission*, 297 U. S. 209, this Court held that Congress had, by the National Bank Act, permitted the States to tax the shares of stock of national banks owned by the Reconstruction Finance Corporation. Shortly after this decision Congress passed an Act expressly exempting such national bank stock, owned by the Reconstruction Finance Corporation, from taxa-

tion by the States. See Act of March 20, 1936, 49 Stat. 1185, 12 U. S. C., Section 51d.

A statutory declaration of immunity may therefore be treated as an expression of congressional opinion as to the necessity for immunity, or as negativing any implication of a waiver of the immunity by Congress, or both. But beyond this point we submit that the question of whether immunity exists in any particular case depends upon whether it can be implied from the Constitution, and in every case this is a judicial and not a legislative question.

CONCLUSION.

We earnestly contend that the recordation of a mortgage on Maryland real estate, from a citizen of the State of Maryland to the Home Owners' Loan Corporation, is not immune from the Maryland recordation tax in view of the fact that the tax is not discriminatory, and that the burden of the tax on the Home Owners' Loan Corporation is speculative, remote and uncertain, if it exists at all. We therefore urge that the judgment of the lower Court be reversed.

Respectfully submitted,

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APPENDIX.

Excerpt from Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937.

CHAPTER 11.

"AN ACT * * * to add two new Sections to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title 'Tax on the Recordation of Instruments in Writing', said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, imposing a tax upon the recordation of instruments in writing * * *."

* * * * * * *

"Sec. 4. AND BE IT FURTHER ENACTED, That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title 'Tax on the Recordation of Instruments in Writing', said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:

"213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics' liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record.

"214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the 'State Fund for Aid to the Needy' to be disbursed therefrom for the purposes and in the manner prescribed by law.

"It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail."

§1461. Short title.

This chapter may be cited as the "Home Owners' Loan Act of 1933." (June 13, 1933, c. 64, §1, 48 Stat. 128).

§1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board created under Chapter 11 of this title.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this chapter.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. (June 13, 1933, c. 64, §2, 48 Stat. 128; June 27, 1934, c. 847, §508 (a), 48 Stat. 1264; May 28, 1935, c. 150, §10, 49 Stat. 296.)

§1463. Home Owners' Loan Corporation.

(a) *Creation; directors.* The Board is hereby authorized and directed to create a corporation to be known

as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.

(b) *Capital stock; subscription by United States; allocation of funds by Reconstruction Finance Corporation.* The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscription shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 609 of Title 15, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) *Bond issue by corporation authorized; interest and principal guaranteed by United States; exemption*

from taxation. In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed $4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided*, That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury

not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under Sections 752, 753 and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Sec-

retary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on April 27, 1934.

(d) *Exchange of bonds for mortgages; amortization of mortgages; interest rates.* The Corporation is authorized, for a period of three years after June 13, 1933, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to June 13, 1933, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding $50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or

lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case $14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semiannually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by

the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000. No discrimination shall be made under this chapter against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purposes of this chapter, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property.

(e) *Cash loans on unincumbered property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) *Cash Loans on mortgaged property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, in any case in which the holder of a home mortgage or other obligation or lien eligible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) *Loans to redeem foreclosed property.* The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) *Appraisal rules.* The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this chapter: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) *Payment of loans in bonds of Corporation.* Any person indebted to the Corporation may make pay-

ment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) *Officers and employees; compensation; free use of mails.* The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this chapter, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State Office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a bona fide resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) *By-laws, rules and regulations; cancellation of bonds; liquidation of Corporation; dividends.* The Board

is authorized to make such by-laws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(l) *When mortgagor must be in default.* No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided*, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) *Advances for rehabilitation, modernization, etc., of homes.* In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilita-

tion, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed $400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) *Purchase of obligations of other banks and associations.* The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under sections 1724

to 1730 of this title, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation $300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection. (June 13, 1933, c. 64, §4, 48 Stat. 129; April 27, 1934, c. 168, §§1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c. 847, §§506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c. 150, §§10-16, 17 (a), 49 Stat. 296-297.)

§1463a. Bonds issued under original provisions; interest and principal.

The amendments made by the Act of April 27, 1934, to subsection (c) of section 1463 of this title (except with respect to refunding) shall not apply to any bonds prior to April 27, 1934, issued by the Home Owners' Loan Corporation under such subsection (c) of section 1463, or to any bonds thereafter issued in compliance with commitments of the Corporation outstanding on April 27, 1934. (April 27, 1934, c. 168 §1(b), 48 Stat. 644.)

Official opinion of the Attorney General of the State of Maryland reported in Volume 22 of the Report and Official Opinions of the Attorney General, page 721.

"July 10, 1937.

Mr. Edward Oswald,
Clerk, Circuit Court for
Washington County.

Your inquiry, received this morning, pertains to the question as to whom the Clerks of Courts shall look for the payment of the recordation tax, imposed by the recently enacted statute to affect instruments of writing recorded or offered for record throughout the State.

In our opinion it is not for the Clerk to concern himself as to the source from which the tax comes, which is paid at the time the instrument is offered for record. Under the terms of the Act, the Clerk is to require the payment of the tax at the time the instrument is offered for record. It is a matter of indifference who has supplied the necessary funds, just so the required amount is received in accordance with the legal provisions.

In other words, if the parties interested in the execution of the instrument desire to make a private arrangement among themselves, it is not the business of the State to concern itself with that phase of the situation. All that the State is interested in is receiving the tax at the time required for its payment.

HERBERT R. O'CONOR,
Attorney General."